Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	CC Docket No. 01-92
Developing a Unified Intercarrier Compensation Regime	)	
	)	

REPLY COMMENTS OF PUBLIC UTILITY COMMISSION OF OREGON ON FURTHER NOTICE OF PROPOSED RULEMAKING

These reply comments are submitted by the Public Utility Commission of Oregon ("Oregon Commission") in response to the Federal Communication Commission's ("FCC") Further Notice of Proposed Rulemaking in the above-captioned docket adopted February 10, 2005 and released March 3, 2005.

Summary

- The FCC should use the principle established by the NARUC Task Force on Intercarrier Compensation to evaluate proposals for intercarrier compensation reform: intercarrier compensation should be unified at rates based on forward-looking economic cost that are economically viable in a competitive market.
- The FCC cannot and, in any case, should not preempt the states.
- Despite the claims of many commenters on both sides, the question of whether Section 251(b)(5) applies to exchange access is not yet answered.
- Even if Section 251(b)(5) does not apply to exchange access mandatorily, the FCC should base intercarrier compensation reform on it. Specifically, the FCC should adopt an intercarrier compensation backstop with a uniform termination charge payable for all intercarrier traffic.
- The FCC should not impose a discriminatory origination charge for exchange access.
- The FCC cannot and should not impose bill and keep.
- The FCC should adopt the ICF edge proposal, with some modifications.
- The FCC should adopt the NARUC Task Force on Intercarrier Compensation Proposal, Version 7, with no origination charge or with an origination charge that is phased out.

- A transition period of three to five years is required.

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I. Introduction

For at least thirty years, the FCC and State commissions have struggled with multiple, inconsistent, fractured systems for intercarrier compensation. The morass has harmed consumers, embroiled the FCC in an interminable series of judicial reversals, and plunged regulators into draining jurisdictional battles. Carefully crafted regulatory walls separating different types of carriers and traffic that use local exchange networks in essentially the same way have crumbled before the creativity of companies striving to gain competitive advantage. Technology has rendered these walls ever more vulnerable to being breached. Patches are not holding for long. The nation cannot afford yet another failed attempt to cling to the past. It is time to take out a fresh sheet of paper and design an intercarrier compensation system that makes sense.

The Communications Act of 1934, as amended, properly envisions that, whenever possible, intercarrier compensation will result from voluntary agreements arrived at by private negotiations between carriers. Most regulators strongly support this policy and the new intercarrier compensation system should do everything possible to encourage voluntary carrier agreements. We must recognize, however, that there are unique circumstances in telecommunications that sometimes impede voluntary negotiations. Carriers have a legal duty to carry every call to its destination. Carrier A cannot decline to complete a call to a customer of Carrier B because it has been unable to reach a voluntary agreement with Carrier B. Moreover, long distance carriers have a duty to carry calls at averaged rates, regardless of the fees they pay for transport and termination. The duty to complete all calls creates a "terminating monopoly" even in an otherwise competitive industry. Recognizing this, Congress created a backstop for negotiations. This backstop comes into play only when carriers cannot reach voluntary agreement. Because the carriers know what to expect if negotiations fail, this backstop makes voluntary agreement more likely. Ironically, the more carefully and clearly this backstop is specified in advance by regulators, the less likely it is to be used. There is no point in going through a process with a predictable result.

The task of coming up with a new intercarrier compensation system is to carefully and fully specify this backstop in a way that motivates carriers to enter voluntarily into reasonable intercarrier compensation agreements. To do so, the backstop must be in accord with marketplace reality and with legal reality. It must survive in the competitive marketplace and in the courts.

II. The FCC should use the principle established by the NARUC Task Force on Intercarrier Compensation to evaluate proposals for intercarrier compensation reform: intercarrier compensation should be unified at rates based on forward-looking economic cost that are economically viable in a competitive market.

In its initial comments, the Oregon Commission endorsed Version 7 of the NARUC Task Force on Intercarrier Compensation Proposal. We did so because we are convinced that it will motivate carriers to enter voluntarily into reasonable intercarrier compensation agreements and that it can survive in the marketplace and in the courts. The Task Force Proposal begins with a standard that is fundamental: [1]

> *Intercarrier compensation for origination and termination should be unified at rates that are based on forward-looking economic (not embedded) costs and that are economically viable in a competitive market environment. Unified means that the rates should be the same for all traffic in both interstate and intrastate jurisdictions, the same for all interconnecting carriers, and the same for exchange and exchange access interconnection.*

[1] Notice of Written Ex Parte Communication from NARUC, filed via ECFS in CC Docket No. 01-92, May 18, 2005, Appendix C, page 2.

Every proposal advanced in this proceeding should be measured against this standard, and most will fail. Because this standard is so critical, we will discuss it in detail.

Markets are driven by forward looking economic costs, not by embedded costs. This is apparent to every homeowner who has sold a house, to every person who has traded in a car, and even to economic theorists. Fortunately, the Congress adopted a cost standard for transport and termination in Section 252 that is viable in a competitive market: "a reasonable approximation of the additional costs of terminating such calls."[2] This incremental cost standard is comparable to the way prices are set in competitive markets. Proposals that establish intercarrier compensation on any other cost basis are doomed to be exploited and undermined in the marketplace.

Rates must be unified. There is no economic justification for non-uniform rates. Local exchange carriers cannot charge wildly different prices for providing the same terminating functions depending on whether the traffic is local or toll or EAS, intrastate or interstate, exchange or exchange access, ISP originated or not, etc..[3] No one having even a passing familiarity with telecommunications history over the past thirty years should doubt this. The creation of artificial categories for the purpose of applying discriminatory rates sets off a mad dash by carriers to get themselves and their traffic classified in the lowest cost category. Regulators are incapable of ever preventing such gaming. The economic incentives for the carriers to undermine the discriminatory categories are simply too great; in any case, the discrimination leads to inefficient use of the nation's telecommunications

[2] Section 252(d)(2)(A)(2). We discuss intercarrier compensation for origination below. See Section VI.
[3] Of course, to the extent that different carriers' uses of local exchange networks cause different "additional costs of such calls," these cost differences should be reflected in rate differences in a unified plan.

infrastructure. Can anyone doubt, for example, that the MTA rule[4] for wireless carriers is a major factor in the massive shift in toll calling from wireline to wireless networks? Is anyone really surprised that VOIP carriers are using ISP interstate access lines (i.e. local business lines) to terminate interexchange traffic? Can we really ignore the impact of discriminatory access charges on the demise of interexchange carriers? Is the controversy over virtual NXXs really a surprise?[5] These are all results of a rate structure that is not unified. Regulators should not enable regulatory gamesmanship and inefficiency.

The Task Force took considerable care in defining what unified means. The definition calls for an end to rates that differ by jurisdiction, by carrier, or by category of traffic. Proposals that do not call for unified rates should be promptly dismissed.

III. The FCC cannot and, in any case, should not preempt the states.

The Oregon Commission has examined the legal arguments in support of FCC preemption, most notably those of the Intercarrier Compensation Forum, and has concluded that they are unlikely to prevail. In any case, the FCC's decision in this docket will almost certainly be appealed. Should the

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[4] The FCC's rules apply reciprocal compensation to "[t]elecommunications traffic exchanged between a LEC and a CMRS provider that, at the beginning of the call, originates and terminates within the same Major Trading Area, as defined in Sec. 24.202(a) of this chapter." 47 CFR 51.701(2) MTAs can span several states..

[5] "Virtual NXXs" are numbering codes that are reportedly used by CLECs to convert what would otherwise be inter-exchange traffic subject to access charges to "local" traffic" subject to reciprocal compensation. *See, e.g.,* Letter from Karen Brinkmann, Counsel to CenturyTel, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket Nos. 96-98, 99-68 and 01-92 (filed Feb. 1, 2005); Letter from Karen Brinkmann, Counsel to CenturyTel, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket Nos. 96-45, 96-98, 99-68 and 01-92 (filed Jan. 27, 2005) (same); Letter from Karen Brinkmann, Counsel to CenturyTel, to Marlene H. Dortch, Secretary, Federal Communications Commission, Docket Nos. 96-98, 99-68, 01-92, and 04-36 (filed Nov. 10, 2004) (same).

FCC preempt it, the Oregon Commission is likely to be one of those appellants. The fact is that the Communications Act of 1934 contemplates a partnership between federal and state regulators and the states are assigned a number of specific roles. As just one example, when Congress addressed implementation of Section 251 in Section 251(d)(3), it was careful to preserve state access regulations :

> *(3) PRESERVATION OF STATE ACCESS REGULATIONS.-- In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that--*
>
> > *(A) establishes access and interconnection obligations of local exchange carriers;*
> > *(B) is consistent with the requirements of this section; and*
> > *(C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.*

Why would the Congress expressly reserve a State commission role in establishing access and interconnection obligations of local exchange carriers if it intended that the FCC preempt State commissions? So long as State commissions act in ways that are consistent with Section 251 and do not <u>substantially</u> prevent its implementation, they have express authority to do so.

Suppose, however, that the FCC decides that it has an argument for preemption. Should it preempt?

Procedurally, the FCC should anticipate extended litigation and the arguments for a stay are strong. A long period of uncertainty would ensue. During that time, the current intercarrier compensation regimes would continue their collapse.

FCC preemption of State commission jurisdiction over intrastate exchange access would not create unified intercarrier compensation. Section 252 gives States the primary role in arbitrating intercarrier disputes over appropriate compensation for the transport and termination of telecommunications. Even if the FCC could preempt the States' jurisdiction over intrastate exchange access, it could not repeal these express statutory provisions. We discuss the dispute over the scope of Section 252 below, but there is no dispute as to its applicability to intraexchange intercarrier compensation at a minimum.

Does the FCC believe that the best course is to consolidate all regulatory authority over all aspects of interconnection and intercarrier compensation inside the beltway? Is it prepared to add the staff necessary to handle all arbitrations and other intercarrier compensation disputes on a case by case basis? We believe that the FCC should not look forward to assuming the state regulatory role over intercarrier compensation.

The NARUC Task Force adopted the principle for intercarrier compensation reform discussed in Section II despite the fact that unifying rates across jurisdictions implies some loss of autonomy for State commissions. It has proposed a voluntary, cooperative federalism approach with the FCC that will result in rate uniformity without a protracted jurisdictional struggle. We believe that is what Congress intended.

Should the FCC conclude that federal preemption is necessary, the proper course is to seek amendments to the Communications Act. As everyone knows, legislative action is uncertain and will result in protracted, debilitating delay.

IV. Despite the claims of many commenters on both sides, the question of whether Section 251(b)(5) applies to exchange access is not yet answered.

Section 251(b)(5) contains only sixteen words, yet it has generated thousands of words in the comments. Each side claims that its position is unambiguously correct. The facts are otherwise.

Section 251(b)(5) establishes the following duty of all local exchange carriers:

(5) RECIPROCAL COMPENSATION.--The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

The term telecommunications is defined in Section 3 of the Act:

(43) TELECOMMUNICATIONS.--The term "telecommunications" means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

In its Order on Remand and Report and Order in CC Docket Nos. 96-98 and 99-68 (16 FCC Rcd 9151 "Remand Order"), the FCC had found a carve-out from Section 251(b)(5) for ISP traffic in Section 251(g). The DC Circuit rejected this reasoning in Worldcom, Inc. v. FCC (288 F. 3d 429):

> *Because that section is worded simply as a transitional device, preserving various LEC duties that antedated the 1996 Act until such time as the Commission should adopt new rules pursuant to the Act, we find the Commission's reliance on §251(g) precluded.*

The Court went on to be very specific about what it was <u>not</u> finding:

> *For example, as in Bell Atlantic, we do not decide whether handling calls to ISPs constitutes "telephone exchange service" or "exchange access" (as those terms are defined in the Act, 47 U.S.C. § § 153(16), 153(47)) or neither, or whether those terms cover the universe to which such calls might belong. Nor do we decide the scope of the "telecommunications" covered by § 251(b)(5). Nor do we decide whether the Commission may adopt bill-and-keep for ISP-bound calls pursuant to § 251(b)(5); see § 252(d)(B)(i) (referring to bill-and-keep). Indeed these are only samples of the issues we do not decide, which are in fact all issues other than whether § 251(g) provided the authority claimed by the Commission for not applying § 251(b)(5).*

This express reservation about the scope of § 251(b)(5) is particularly interesting because of the Court's earlier observation in the same case:

> *Although its literal language purports to extend reciprocal compensation to all "telecommunications," the Commission has construed it as limited to "local" traffic only.*

In the ISP Remand Order, the FCC had concluded as follows:

> *32. Unless subject to further limitation, section 251(b)(5) would require reciprocal compensation [**42] for transport and*

> *termination of all telecommunications traffic,--i.e., whenever a local exchange carrier exchanges telecommunications traffic with another carrier. Farther down in section 251, however, Congress explicitly exempts certain telecommunications services from the reciprocal compensation obligations. Section 251(g) provides. . .*

Since the Court ruled that Section 251(g) is not a carve-out, this FCC analysis suggests that all traffic is subject to 251(b)(5).

This is where the matter stands more than three years later.

Plainly, intercarrier compensation reform must proceed with substantial uncertainty about the scope of telecommunications covered by Section 251(b)(5).

V. Even if Section 251(b)(5) does not apply to exchange access mandatorily, the FCC should base intercarrier compensation reform on it. Specifically, the FCC should adopt an intercarrier compensation backstop with a uniform termination charge payable for all intercarrier traffic.

Despite the uncertainty about the applicability of Section 251(b)(5) to exchange access, there seems to be no doubt about its applicability to "exchange" (i.e. intraexchange) intercarrier traffic. If the FCC agrees with the NARUC Task Force that rates must be unified and that unified means "*that the rates should be the same for all traffic in both interstate and intrastate jurisdictions, the same for all interconnecting carriers, and the same for exchange and exchange access interconnection,"* then rates for exchange access must be unified with the rates for exchange interconnection that are subject to Section 251(b)(5).

If unification is a goal, then, even if Section 251(b)(5) does not apply to exchange access, rates for exchange access must be unified with rates for traffic to which the section does apply. The FCC must either abandon unification as a goal or accept this conclusion.

What does this mean? As the FCC has observed, 251(b)(5) has historically been viewed as a calling party's network pays ("CPNP") regime.[6] In the local context, the originating carrier is assumed to be providing a service to its customer for completion of calls throughout the local calling area. If another carrier—the terminating carrier—performs part of this service for the originating carrier, then payment is due. Congress wisely chose a cost standard—"the additional costs of such calls" —that leaves the terminating carrier just indifferent between completing the calls or not. It receives only the additional costs that such traffic occasions. If the FCC observes carriers aggressively seeking terminating traffic, that is a telltale sign that the reciprocal compensation amount exceeds the additional costs of such calls. That is precisely why incumbent local exchange carriers are paying billions of dollars in reciprocal compensation to competitive local exchange carriers who have attracted ISPs as customers.

There is a great deal of debate as to how the reciprocal compensation CPNP regime would apply to exchange access. There are at least four possible views.

A. The IXC as Terminating Carrier

First, the interexchange carrier can be viewed as performing the same function as the terminating carrier in the local context. The IXC is completing the call for the originating carrier and, on this reasoning, would receive terminating reciprocal compensation from the originating local exchange carrier. Similarly, the IXC would pay reciprocal compensation to the terminating local exchange carrier. This view results in payments that are the same as local reciprocal compensation if the IXC's termination charge to the originating local exchange carrier equals the local reciprocal compensation charge. In both the local and the interexchange case, the

[6]Order on Remand and Report and Order in the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic, CC Docket Nos. 96-98 and 99-68, 16 FCC Rcd 9151 ("Remand Order") at paragraph 66.

incidence of the reciprocal compensation charge is on the originating local exchange carrier.

B. The IXC as Transiting Carrier

Second, the interexchange carrier can be viewed as akin to a transiting carrier. In this case, the originating local exchange carrier would owe reciprocal compensation to the distant terminating local exchange carrier. As a practical matter, the first alternative is a preferable way to implement this.

C. The IXC as the Calling Party's Carrier

Third, the originating local exchange carrier could be viewed as fulfilling its responsibility by handing off the call to the IXC without the payment of terminating reciprocal compensation on the theory that the IXC receives compensation for its transport and termination costs from the end user and that this is a perfectly acceptable way to implement Section 251(b)(5). In this case, the IXC would be compensated by its customer for the interexchange transmission of the call and for the transport and termination fees it pays to the terminating local exchange carrier.

D. The IXC as Retail Service Provider

Finally, there is a modification of CPNP known as retail service provider pays (RSPP) espoused by the Alliance for Rational Intercarrier Compensation ("ARIC"). In this view, payment is owed by the Retail Service Provider to both the originating and the terminating local exchange carrier. In the local case, it is argued, the retail service provider is the originating local exchange carrier, so it is only liable for payment to the terminating carrier. However, in the case of exchange access, the interexchange carrier is viewed as the retail service provider, and so payment is owed by the IXC to both the originating and the terminating local exchange carrier. Since this view requires charges for origination, its proponents argue that interexchange traffic is not subject to Section 251(b)(5).

The NARUC Task Force agreed that one of the latter two views is most appropriate. It could not agree on a single view, so two are presented in

Version 7 of its proposal. The practical difference between the two is whether an originating access charge is payable to the originating local exchange carrier by the IXC.

The Oregon Commission prefers the third alternative described above, the one with no origination charge and a uniform charge applicable to all traffic terminating on a local exchange carrier's network but would consider supporting an origination charge such as described in Alternative D if it were phased out over a three to five year time frame. We prefer the Alternative C approach of no origination charge after comparing each option to the NARUC Task Force principle, Sections 251 and 252 of the Communications Act and because it is the most sustainable before the courts and in the marketplace.

The NARUC Task Force left the door open for an origination charge if one can be developed that meets the NARUC Task Force principle described in Section II and the Oregon Commission agrees. Such an origination charge must be compatible with Section 251 because that section applies to local traffic at a minimum.

VI. The FCC should not impose a discriminatory origination charge for exchange access.

In Version 7 of the NARUC Intercarrier Compensation Task Force proposal, the second alternative for origination charges is as follows:

> *Originating access payments should be required whenever a retail service provider (such as an IXC) exercises a legal right to use another carrier's facilities to originate switched traffic. Payments should be made to the LEC that owns or controls the end user's originating facilities. The originating rate would be $0.002 per-minute.*

It is immediately apparent that this alternative violates the NARUC principle as the charge is clearly not unified. There is no origination charge except when a third party retail service provider, for practical purposes an IXC, is involved in the transmission of the call. Recall that the NARUC principle is that "[u]nified means that the rates should be the same for all traffic in both interstate and intrastate jurisdictions, the same for all interconnecting carriers, and the same for exchange and exchange access interconnection." This alternative contemplates a charge that is not the same for all interconnecting carriers and not the same for exchange and exchange access interconnection.

This alternative runs a grave risk of being overturned by the courts since it relies on interexchange traffic being exempt from Section 251(b)(5). Its proponents attempt to present a convincing case that Congress did not intend exchange access traffic to be considered "telecommunications." As explained previously, this case is on shaky legal ground, and adoption of an origination charge will lead to years of litigation and uncertainty.

Moreover, even if the alternative were not to be overturned by the courts, it would not be sustainable in the marketplace for the same reason that the current regimes cannot be sustained: it creates an economic incentive for carriers to "misclassify" themselves and/or their traffic in order to gain competitive advantage. The inevitability of this result is apparent to students of telecommunications history. The various "enhanced" forms of FX service, and services like MCI's Execunet are examples from the seventies. More recently, efforts to define services as enhanced in order to avoid access charges have been popular. Another example is the reported use of dial-up ISP lines to complete traffic originated on broadband facilities using Voice over IP ("VOIP").

One can easily envision carriers asserting that they are not "third carriers," but rather are terminating carriers entitled to compensation. Suppose for example that the IXC is a division of a local exchange carrier. Only two carriers are involved in the call and the terminating local carrier can rightfully claim to be entitled to compensation. Suppose that the terminating carrier is a wireless service provider that claims to be entitled to terminating compensation whenever a call is made to one of its subscribers in the same MTA. Do we still demand that the "third party" IXC pay originating and terminating access for comparable calls?

Another example is even more troublesome. Vonage currently offers its subscribers the opportunity to choose a phone number almost anywhere in the country regardless of the location of the subscriber.[7] If I live in Salem, Oregon but choose a Los Angeles number, when someone calls me from Los Angeles on my Vonage connection, can Vonage demand terminating reciprocal compensation, while, if someone calls me on my landline phone, must the IXC pay originating and terminating access? This sort of uncertainty creates fertile ground for legal creativity.

While these examples may seem diverse, they are all a manifestation of the same problem. Attempting to create multiple intercarrier compensation systems based on whether there are two or three carriers involved in the call or whether the usage of the local network is exchange or exchange access is doomed. We want carriers to apply their creative talents to developing and providing services, not to legal/regulatory strategies.

We must not lose sight of the consumer harm and economic inefficiency that are created when regulatory policies distort the marketplace. The shift of long distance traffic to wireless networks and the decline in wireline access minutes can be attributed in significant part to discriminatory access charge regimes. There is a complex pattern of distributional consequences that results from this inefficiency. In the case of long distance, one such effect may be that consumers who cannot afford wireless phones pay higher rates to make long distance calls.

This proposal for an origination charge payable only by third-party IXCs is based on the assertion that there is a cost for equal access that must be recovered. No attempt has been made to show that this cost is traffic

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[7] "With Vonage, you are no longer tied to your "local area code". You can select any area you want from our list. This means even if you live in New York, you can have a California number." When a potential subscriber clicks on California, he or she is offered an exhaustive list of cities to choose from. See http://www.vonage.com/avail.php.

sensitive or that it can justify a charge of $.002 per minute. Even if one were convinced that there should be a separate rate element to recover equal access costs, it should likely be a flat monthly charge paid by subscribers rather than a usage sensitive charge paid by carriers.

VII. The FCC cannot and should not impose bill and keep.

The ICF and some other parties advocate that the FCC impose bill and keep for all intercarrier traffic. Bill and keep has substantial theoretical advantages, as the FCC staff has pointed out. The proponents, however, have not convinced us that the FCC can impose bill and keep.

The Communications Act does not establish bill and keep as an alternative to Section 251(b)(5)'s transport and termination reciprocal compensation regime. Rather, it is a way of implementing that regime under specific circumstances. Specifically, Section 252(d) provides, in part:

> *(2) CHARGES FOR TRANSPORT AND TERMINATION OF TRAFFIC.--*
>
> *(A) IN GENERAL.--For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5), a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless--*
>
> *(i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and*
>
> *(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.*
>
> *(B) RULES OF CONSTRUCTION.--This paragraph shall not be construed--*
>
> *(i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements);*

Suppose the FCC mandates bill and keep and consider the case of an incumbent local exchange carrier that receives more terminating traffic than it originates. That carrier would appear to have a legal claim that it is not being permitted to recover the costs associated with transport and termination. Bill and keep is not precluded when it affords the recovery of costs "through the offsetting of reciprocal obligations," but there is no valid reason for the FCC to assume that reciprocal obligations offset in all cases. It cannot transform an option that is available in arbitrations where the facts show that bill and keep would result in the offsetting of mutual obligations into a general rule that negates the arbitration provisions of Section 252.

Even if the FCC concludes that it can impose bill and keep under the statute, it should not do so. Claims have been made in the comments that the imposition of bill and keep will result in inefficient overuse of local exchange networks, but we find such arguments unconvincing. Flat-rated local and toll service offerings are common from incumbent and competitive carriers. The major public policy concern about incumbent local exchange networks is that they will be underused, not that they will be overused. It is generally understood that wireline networks can carry substantial additional traffic at low additional cost.

The real reason that the FCC should not adopt bill and keep even if it believes that it can do so as a matter of law is that doing so would create an excessive burden on the federal Universal Service Fund. Incumbent local exchange carriers, particularly rural carriers that derive a substantial portion of their current revenues from intercarrier compensation, are understandably reluctant to become so dependent on the federal Universal Service Fund. The FCC has not, so far, established a stable and competitively neutral source of funding for universal service. From a public policy perspective, universal service support creates a number of incentives for recipients that may not cause them to control investment and expenses the way a competitive marketplace does. The ICF proposal is particularly flawed in this regard because it provides for the automatic recovery of a portion of intercarrier compensation losses without addressing the issue of accountability.

VIII. The FCC should adopt the ICF edge proposal, with some modifications.

The NARUC Task Force on Intercarrier Compensation proposes that the FCC adopt the ICF edge proposal as a starting point on which to base a network architecture for intercarrier compensation. A threshold question that has been raised by some is whether, in the context of intercarrier compensation reform, there is a need to adopt a network architecture at all.

It is important to emphasize that the edge proposal is a default architecture that is a part of the backstop in case intercarrier negotiations fail to result in voluntary agreement. Carriers are free to negotiate other network architectures.

It makes no sense to think about establishing a new intercarrier compensation regime without addressing the issue of network architecture. The purpose of a network architecture is to assign responsibilities among carriers for interconnection and completion of intercarrier calls. The appropriateness of payments to a carrier for the performance of functions required for the completion of intercarrier traffic cannot be evaluated without a definition of what the functions entail. Doing otherwise is analogous to evaluating whether $150 is too much to pay for groceries without describing what is in the grocery bags.

The two major network architecture alternatives that have been offered by commenters are the retention of the status quo and the ICF edge proposal.

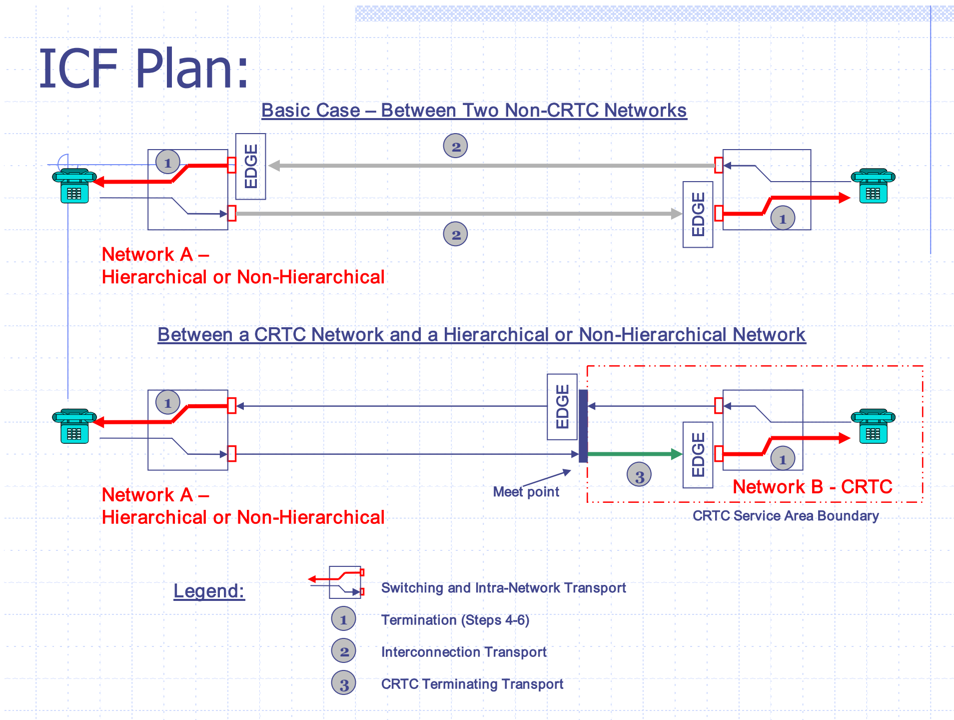
Proponents of maintaining the status quo argue that it avoids the costs and confusion associated with moving to a new architecture. The difficulty with this position is that several commenters identify serious issues with the status quo. The comments of Verizon Wireless and Sprint are good examples.[8] There are currently so many discriminatory architectures that are applied to different types of intercarrier traffic that unification on this basis would be illusory.[9]

The ICF edge proposal is the only fully developed alternative to the status quo that has been offered in this proceeding. As shown in the following diagram, the basic concept is simple. The network serving the calling party has the financial and operational responsibility to carry the traffic to the "edge" of the network serving the called party. This edge has defined technical and operational requirements to make interconnection of the two carriers' networks expedient.

Rural carriers ("CRTCs") are given several important concessions. Carriers that receive traffic from the rural carrier are required to establish an edge in the latter's territory, shown in the diagram at a meetpoint on the boundary. The rural carrier's financial and operational responsibility for originating traffic ends at this edge. Second, rural carriers are allowed to charge approximately $.01 per minute for terminating transport from a meetpoint to their edges at end offices.

[8] See pp. 12-16 of Verizon Wireless's Comments and Sprint's Comments at pp. 17-19

[9] See the Comments of the Intercarrier Compensation Forum, Appendix E, "Current Interconnection Diagrams."



The edge concept was developed as a network architecture to support bill and keep, but it is readily applicable to a plan for intercarrier compensation that includes a charge for terminating transport. In fact, the ICF plan includes a terminating charge during the transition. Simply put, the termination charge is received by the terminating carrier for transporting and terminating the call from its network edge to the called subscriber. This is uniformly true for all traffic.[10]

The ICF's implementation of the edge concept is quite complicated. The NARUC Task Force is not yet convinced that all of the complication is necessary. Several suggestions are being explored. They include combining the hierarchical and non-hierarchical categories, combining the non-hierarchical and CRTC categories, and changing the way edge rules apply to rural carriers.

There are two issues related to the edge concept that require further exploration. The first is the application of the edge rules in those instances

[10] To emphasize again, these rules are for a backstop that apply in the absence of a negotiated agreement between the carriers.

where rural carriers jointly own and operate a central access tandem. The second is the way the ICF proposal treats tandem transit, typically tandem switching and transit provided by a Regional Bell Operating Company ("RBOC"). Rural companies, competitive local exchange carriers, and wireless companies have all expressed the concern that they have no alternative to the use of this tandem transit service and that the tandem transit provider's market power must be constrained.

All of these ideas will be explored at the Task Force's next Workshop in Austin, Texas during July.

IX. The FCC should adopt the NARUC Task Force on Intercarrier Compensation Proposal, Version 7, with no origination charge or with an origination charge that is phased out.

The NARUC Task Force on Intercarrier Compensation has put forward a comprehensive proposal. It is based on the NARUC principle described above and has been the subject of extensive debate, constructive criticism, and refinement, not only by state regulators but by all of the industry stakeholders as well, at numerous workshops held around the country. It is a plan that is competitively neutral, legally defensible, sustainable in the marketplace, and economically efficient. It is a plan that promotes intercarrier negotiation and agreement as a first choice. It is a plan for a backstop that comes into play when negotiations fail but has its greatest value in encouraging voluntary agreements.

The Oregon Commission has concluded that a practicable plan for intercarrier compensation reform must adhere to the NARUC principle. That means rates must be unified. There is no dispute that intercarrier exchange traffic is subject to Section 251(b)(5). Taken together, these two requirements imply that exchange access traffic must be compatible with Section 251(b)(5) whether or not it is included within the definition of telecommunications to which the Section applies. In a basic sense, therefore, the debate over whether Section 251(b)(5) applies to exchange access is academic.

We have examined all of the alternatives for intercarrier compensation reform put forward in this proceeding from this perspective. Our conclusion is that Version 7 of the NARUC Task Force on Intercarrier Compensation's proposal with no origination charge is the only alternative brought forward to date that meets these conditions and we urge its adoption.[11]

X. A transition period of three to five years is required.

The proposal developed by the NARUC Task Force on Intercarrier Compensation and endorsed by the Oregon Commission entails substantial changes to the status quo. Such a change might be disruptive if not accomplished over a period of years.[12] Consumers, carriers, and regulators can all adjust with less dislocation if adequate time is taken. While it is urgent that intercarrier compensation reform be begun immediately, it is not essential that it be completed immediately so long as the transition is finite and well-specified. If the endpoint is several years out but clear, carriers will make their business plans on that basis. Likewise, consumers can more easily adjust to changed circumstances if the changes occur gradually. Finally, the regulatory process requires time for due process.

The NARUC Task Force recommended that a three year transition be adopted. The Oregon Commission believes that the transition could take even longer if the end point is clearly specified and conscientiously adhered to. Five years is a reasonable upper limit. It is so important that the FCC adopt a sound, viable plan for intercarrier compensation reform that this goal must take precedence over the pace at which the reforms are adopted.

[11] As already indicated, we would consider the adoption of a transitional origination charge that is phased out.

[12] Of course, the continuing disintegration of the current regimes for intercarrier compensation would be more disruptive.

XI. Conclusion

In the introduction to these reply comments, the Oregon Commission stressed that the first choice for the determination of intercarrier compensation is voluntary agreements reached between carriers. Intercarrier compensation reform plans exist to provide a backstop to voluntary negotiations in case they fail to result in an agreement. As we observed, the more carefully and clearly this backstop is specified in advance by regulators, the less likely it is to be used.

It is time to adopt intercarrier compensation reform that will facilitate voluntary negotiations and, in so doing, bring the full benefits of the nation's investment in telecommunications infrastructure to our consumers.